

U.S. Department of Labor

Office of Administrative Law Judges
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In the Matter of

ALPHA CORPORATION
Complainant

v.

U.S. DEPARTMENT OF LABOR
Respondent

and

MR. SAMI-AL-SOUFI
Party in Interest

Date Issued: October 11, 2000

Case No.: 2000-JSA-1

APPEARANCES:

Mr. Jeffrey E. Gonzalez-Perez, Attorney
On Behalf of the Complainant

Ms. Jinny Chun, Attorney
Ms. Melonie McCall, Attorney
On Behalf of the Respondent

Mr. Sami Al-Soufi, *Pro Se*

BEFORE:

Richard T. Stansell-Gamm
Administrative Law Judge

DECISION AND ORDER

This matter involves a claim filed by Complainant, Alpha Corporation ("Alpha"), under the Job Services Complaint System ("JSCS")¹ established by the Wagner-Peyser Act of 1933, as amended, 29 U.S.C. 49, *et. seq.*, and the regulations thereunder at 20 C.F.R. Part 658, Subpart E. Pursuant to 20 C.F.R. § 658.421(d), Alpha requested an appeal before a U.S. Department of Labor ("DOL") administrative law judge of a determination made by the Regional Administrator ("RA") of the Employment

¹An index of the multiple abbreviations in this decision is provided on page 26.

and Training Administration (“ETA”), DOL, that Mr. Al-Soufi was a Level III engineer when employed by Alpha. Having been designated to resolve Alpha’s request under 20 C.F.R. § 658.424, I conducted a formal hearing in Washington, D.C., on December 6, 1999, attended by Mr. Gonzalez-Perez, Ms. Chun, Ms. McCall, and Mr. Al-Soufi.

Preliminary Evidentiary Discussion and Decision

After the Complainant and Respondent had rested, Mr. Al-Soufi, as the party in interest, presented additional documents (PX 1 and PX 2)² and testified. Upon completion of his testimony, I specifically asked Mr. Al-Soufi if he had anything further to present (TR, page 166). Since he answered “no,” I closed the hearing record upon completion of the December 6, 1999 hearing. I also informed the parties that I would accept closing briefs from Alpha through January 15, 2000 and from DOL and Mr. Al-Soufi through January 30, 2000.

Although I had already closed the hearing record, Mr. Al-Soufi included with his February 2, 2000 closing brief ten attachments consisting of new evidence (marked “PX 3 for Identification”). On February 14, 2000, Alpha strenuously objected to Mr. Al-Soufi’s attempt to submit post-hearing evidence. A few days later Mr. Al-Soufi replied that the new evidence is necessary in response to the new claims made by Alpha during the hearing.

The hearing in this case was conducted under the rules and procedures found in 20 C.F.R. §658.424. Concerning the admission of evidence, the regulation at 20 C.F.R. §658.424 (k) indicates that I am not bound by the “technical rules of evidence.” At the same time, “rules and principles designed to assure “the most credible evidence available” are applicable. To find such rules and principles, I turn to 29 C.F.R. § 18 which establishes the rules of procedure for administrative hearings before the Office of Administrative Law Judges (“OALJ”). In particular, two sections found in Subpart A: 29 C.F.R. §§ 18.54(a) and (c) are applicable to Mr. Al-Soufi’s proffer of post-hearing evidence. Section § 18.54(a), mandates that “when there is a hearing the record shall be closed at the conclusion of the hearing unless the administrative law judge directs otherwise.” As previously noted, absent a request from any party to the proceeding, I closed the hearing on December 6, 1999.

The second section, 29 C.F.R. § 18.54(c), dictates that “once the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record.” In that regard, I find the evidence Mr. Al-Soufi attempted to admit with his post-hearing brief was clearly available prior to the closing of the record. So, 29 C.F.R. §§ 18.54(a) and (c) preclude Mr. Al-Soufi from introducing the evidence attached to his closing brief.

²CX - Complainant’s exhibit; RX - Respondent’s exhibit, PX - Party-in-Interest exhibit, TR - Transcript of hearing.

In terms of fairness, I observe that I informed the parties at the start of the hearing that my decision would be based solely on the evidence admitted during the proceeding, unless for good cause I kept the record open for receipt of post-hearing evidence (TR, page 8). In addition to that general statement, I also gave Mr. Soufi, prior to the close of the hearing, and after Alpha Corporation had presented all its “claims,” an opportunity to provide additional evidence; but, he declined. Consequently, his evidentiary submission of February 2, 2000 arrived too late both under the regulations and in terms of equity. Alpha Corporation’s objection to the admission of PX 3 for Identification³ is sustained. My decision in this case is based solely on the sworn testimony presented at the December 1999 hearing and the documents admitted into evidence (CX 1 to CX 10; RX 1 to RX 7; and PX 1 and PX 2)

Background and Procedural History

This case, entitled 2000-JSA-1, is a really a proceeding that was conducted as a prerequisite to continuing with the resolution of 1999-LCA-2. And, 1999-LCA-2 itself arose directly from a companion litigation entitled “1998-LCA-1.” To help place the issue in this present case, 2000-JSA-1, into perspective a review of underlying regulatory bases and the lengthy and torturous procedural histories associated with all three cases is necessary.

Labor Condition Application Regulations

The Secretary, U.S. Department of Labor, promulgated the regulations at 20 C.F.R. § 655 to implement federal law, 8 U.S.C. § 1101, which facilitates the temporary employment of non-immigrant foreign workers in certain occupations provided such employment does not adversely affect the wages or working conditions of U.S. workers. Part of the regulatory process requires an employer seeking to employ non-immigrant foreign workers to file a Labor Condition Application (“LCA”) with ETA. In the LCA, the employer promises to: pay the higher of the prevailing or actual wage, provide working conditions that will not adversely affect the working conditions of other employees, prevent labor-driven strikes or lockouts in the non-immigrant’s occupational classification, and provide notice of the filing of the LCA to the bargaining representative (if there is none, post notice of the filing in conspicuous places at work) and the non-immigrant foreign workers. 20 C.F.R. § 655.730(d) and 20 C.F.R. §§ 655.731 through 655.734. If the LCA is complete and accurate, the ETA will certify the document. Then, the employer may submit a non-immigrant visa petition together with the certified LCA to Immigration and Naturalization Service (“INS”) requesting H-1B classification for the foreign worker. 20 C.F.R. §§ 655.700(a)(3). If INS approves the H-1B classification, the non-immigrant may then apply for an H-1B work visa. 20 C.F.R. §§ 655.700(b)(2)-(3) and 655.740.

In the cases before me, the most significant employer assurance on the LCA concerned wage rate. As noted above, the employer promises to pay the foreign worker the *higher* of the actual wage or the

³PX 3 for Identification is located in the case file after the admitted documentary evidence.

prevailing wage. Under the regulations, the *actual wage rate* is “the wage rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question. In determining such wage level, the following factors may be considered: experience, qualifications, education, job responsibility and function, specialized knowledge, and other legitimate business factors.” 20 C.F.R. § 655.731(a)(1). The *prevailing wage* for “the occupational classification in the area of employment must be determined as of the time of filing the application. The employer shall base the prevailing wage on the best information available as of the time of filing the application.” The employer uses one of the following sources to establish the prevailing wage: Davis-Bacon Act, Service Contract Act, union contract, a State Employment Security Agency (“SESA”)⁴ determination, an independently authoritative source, or other legitimate sources of wage data. 20 C.F.R. 655.731(a)(2).

To address disputes concerning an LCA, the regulations task the Administrator of the Wage and Hour Division (“Administrator”) of the Employment Standards Administration (“ESA”), DOL, with the investigation of, and subsequent determination of violations relating to, complaints filed by an individual adversely affected by an employer’s failure to comply with the LCA promises. 20 C.F.R. §§ 655.705(a)(2); 655.710; and 655.805.⁵ If an employee files a complaint alleging either an employer’s failure to meet the prevailing wage or a material misrepresentation by the employer regarding the payment of the required wage, the Administrator may contact the ETA, who may then consult with the appropriate SESA to determine the prevailing wage. In response, the ETA will provide the Administrator with a prevailing wage determination, which the Administrator shall use as the basis for determining violations and for computing back wages. 20 C.F.R. § 655.731(d) and 655.805(d)(4).⁶

Upon completion of the investigation, the Administrator shall issue a written determination as to whether or not any violations have been committed. 20 C.F.R. § 655.815. Then, within fifteen days of such determination, any interested party may request a hearing with the Office of Administrative Law Judges (“OALJ”), DOL. For example, the complaining employee may request a hearing if the Administrator determines there is no basis for a finding that the employer committed violations of the LCA. 20 C.F.R. § 655.820(b)(1). “In such a proceeding, the party requesting the hearing shall be the prosecuting party and the employer shall be the respondent; the Administrator may intervene as a party.” Likewise, an employer “may request a hearing where the Administrator determines...that the employer has committed violation(s). In such a proceeding, the Administrator shall be the prosecuting party and the employer shall be the respondent.”

⁴The state agency designated to cooperate with the United State Employment Services (“USES”) in the operation of the national system of public employment offices.

⁵Specifically, Subpart I of 20 C.F.R. § 655 governs the enforcement of H-1B LCAs.

⁶Under the provisions of 20 C.F.R. § 655.731(d)(2), an employer may dispute a prevailing wage the Administrator obtains from ETA through the JSCS.

Job Service Complaint System Regulations

As discussed above, the Administrator may obtain prevailing wage information from ETA which, in turn, obtains the wage data from the state agency, SESA. If an employer disagrees with the prevailing wage determination by the SESA, the JSCS regulations provide an avenue for appeal in 20 C.F.R. Part 658, Subpart E. The appeal shall be initiated at the ETA regional office level. 20 C.F.R. § 655.731(d). And, the RA for that office considers the appeal. 20 C.F.R. § 658.421(a). After reviewing the case, the RA shall make his or her determination, which the parties may appeal to the OALJ.⁷ 20 C.F.R. § 658.421(d)-(f). An administrative law judge then considers the appeal, conducts a hearing and renders a final decision. 20 C.F.R. § 658.425(c).

1998-LCA-1

Mr. Sami Al-Soufi began working as an engineer for Alpha Corporation on March 3, 1993 (TR, pages 61, 68, and 131). On August 18, 1994, Alpha filed an H-1B visa petition with INS on behalf of Mr. Al-Soufi. Similarly, Alpha filed H-1B petitions for two other foreign engineers on September 7th and 24th 1995.⁸ As required, Alpha included a certified LCA with each H-1B petition. In February 1996, the three engineers filed complaints alleging violations of the respective LCAs. Pursuant to 20 C.F.R. § 655.805, the Administrator investigated the wages used by Alpha in the LCAs, obtained a wage determination from the state of Virginia, and issued a determination on October 28, 1997 that Alpha, amongst other violations, had not paid the engineers adequate wages and owed them back-pay. On November 10, 1997, pursuant to 20 C.F.R. § 655.820, Alpha filed a timely appeal with OALJ of the determination. The case was captioned 1998-LCA-1. Having been assigned to render a decision in the case, I scheduled a hearing for February 6, 1998. However, I subsequently continued the February hearing so Alpha could challenge the prevailing wage determination through the JSCS.

As a result of Alpha's February 1998 appeal through the JSCS, the Virginia Employment Commission ("VEC"),⁹ on July 16, 1998, issued a new decision setting forth a revised, and reduced, prevailing wage for Level I engineers (as opposed to the Level II salary it had originally used to determine the prevailing wage). Accordingly, the Administrator issued a revised determination. The revised determination, dated October 14, 1998, replaced the Administrator's original October 1997 determination. According to the new Administrator's determination, Alpha still had violated some LCA provisions and owed reduced back wages to two foreign engineers. At the same time, the reduced prevailing wage determination essentially eliminated any pay violation concerning Mr. Al-Soufi and eliminated his back-pay.

⁷Cases under the JSCS appealed to the OALJ for a hearing are identified with a "JSA" caption.

⁸Apparently, these two engineers only had student visas when they started their employment at Alpha (TR, page 118).

⁹The SESA for the State of Virginia.

On November 2, 1998, Alpha requested a formal hearing with the OALJ pursuant to 20 C.F.R. 655.820 because the Administrator still found wage violations regarding the other two engineers. Consequently, in December 1999 I established a new hearing date of February 9, 1999.

About the same time, December 1999, I discovered an appeal by Mr. Al-Soufi, dated October 24, 1998, to the OALJ. Since Mr. Al-Soufi was adversely affected by the October 14, 1998 Administrator's LCA determination of no wage violation in his case, he requested on October 24, 1998 a hearing with OALJ pursuant to 20 C.F.R. § 655.820.¹⁰ Mr. Al-Soufi argued that the recent wage determination was erroneous because it was based on a Level I engineer's salary; whereas, based on his credentials and experience, he was a Level III engineer. After a conference call with all three parties about Mr. Al-Soufi's appeal, I decided his case should be tried separately because the revised wage determination had eliminated all back pay to Mr. Al-Soufi. His separate, distinct case was then captioned 1999-LCA-2.

On February 8, 1999, Alpha and DOL settled the wage dispute concerning to the other two foreign engineers in 1998-LCA-1. As a result, I closed 1998-LCA-1.

1999-LCA-2

In regard to Mr. Al-Soufi's separate complaint, 1999-LCA-2, I set a hearing date of February 11, 1999. In the hearing notice, I pointed out that under 20 C.F.R. § 655.820(b)(1), Mr. Al-Soufi, as the prosecuting party, bore the burden of proof.

At the February 1999 hearing, Mr. Al-Soufi contested three issues: prevailing wage, actual wage, and back-pay. Regarding the prevailing wage, Mr. Al-Soufi asserted that the Administrator erroneously calculated his prevailing wage based on a Level I employee's salary, when, in fact, he was a Level III engineer when the LCA was filed. Regarding the actual wage, Mr. Al-Soufi argued that many engineers similarly situated at Alpha received actual wages higher than the prevailing wage for Level I. And, concerning the back-wages, Mr. Al-Soufi alleged he was not paid from May 29 through June 9, 1995, although he was available and willing to work.

In response, Alpha disagreed that Mr. Al-Soufi's prevailing wage should be based on a Level III engineer salary. Additionally, Alpha proposed that Mr. Al-Soufi should be afforded the opportunity to appeal through the JSCS system as Alpha did - appealing the Administrator's decision first before the VEC

¹⁰Mr. Al-Soufi's timely request for a hearing did not come to my attention until the first week in December when I received a copy of it in a monthly progress report submitted by the parties. In the December 17, 1999 conference call, to which Mr. Al-Soufi was a party, I decided to hear Mr. Al-Soufi's case separately, and captioned it "1999-LCA-2." Also on December 17th, Mr. Al-Soufi's original letter was discovered in OALJ docket section - it apparently, it had been misfiled. Since I found the original of Mr. Al-Soufi's appeal misfiled in the docket section, I determined his appeal was timely

and RA. The representative for DOL, Ms. McCall, agreed, reasoning that because Mr. Al-Soufi was not afforded the opportunity to participate in Alpha's challenge to the prevailing wage, in the interest of justice and fairness, he should be allowed to challenge the prevailing wage under the JSCS before appealing to OALJ. Even though I recognized, as did the DOL representative, that the regulations only allow an *employer* to challenge a prevailing wage, I yielded to the parties' arguments and continued 1999-LCA-2 to permit Mr. Al-Soufi to receive a determination through the JSCS as to his engineering Level and applicable prevailing wage.

On April 21, 1999, the VEC responded to Mr. Al-Soufi's request for a determination of the level of his engineering job while employed with Alpha.¹¹ The VEC found that Mr. Al-Soufi's job description, which included a list of duties certified by Alpha, contained tasks that are more complex and diverse than those of an entry-level engineer. Consequently, the VEC concluded that Mr. Al-Soufi was a Level III engineer while employed by Alpha. Additionally, the VEC found the prevailing wage for a Level III engineer is \$46,904. Predictably, on May 14, 1999, Alpha appealed the VEC's determination that Mr. Al-Soufi was a Level III engineer. After the RA upheld the VEC's determination, Alpha submitted an appeal to this office on August 30, 1999. By Notice of Hearing dated September 3, 1999, I set a hearing date of October 5, 1999.

The October 5, 1999 hearing was essentially a procedural hearing to determine the status of Alpha's appeal of the Level III engineer wage determination. Ultimately, I determined that Alpha's appeal of the latest prevailing wage determination relating to the Level III engineer wage fell under the provision of the JSCS as set out in 20 C.F.R. § 658. As a result, Alpha's appeal needed to be resolved in a separate hearing prior to continuing the hearing on Mr. Al-Soufi's case, 1999-LCA-2. I designated Alpha's appeal case "2000-JSA-1."

2000-JSA-1

In light of the early October 1999 procedural hearing, I set a hearing date of November 5, 1999 for Alpha's appeal case (ALJ 1). After granting one continuance (ALJ 2), I conducted the hearing on December 6, 1999.

ISSUE

Whether the Regional Administrator's determination that Mr. Al-Soufi was Level III engineer with a prevailing wage of \$46,904 at the time of the August 18, 1994 Alpha Corporation Labor Certification Application is appropriate.

¹¹The VEC accepted Mr. Al-Soufi's request under 20 C.F.R. §§ 655.731 and 658.

Summary of Evidence

For the Complainant

Mr. Al-Soufi's Application for Licensing as a Professional Engineer (CX 1)

In November 1994, Mr. Al-Soufi applied to the Virginia Board for Architects, Professional Engineers, Land Surveyors, and Landscape Architects, Department of Professional and Occupational Regulation ("Virginia Board"), for his license as a Professional Engineer. On his application, Mr. Al-Soufi listed his education as: B.S. in Civil Engineering in August 1988 from Middle East Technical University, Master of Structural Engineering in September 1990 from McGill University, and a Master of Science in Civil Engineering in December 1992 from University of Maryland. He included with the application a list of his professional experience with Alpha. The application asked Mr. Al-Soufi to "make explicit statements, listing and defining work performed, listing and defining projects for which he/she had full or partial responsibility, including statement of extent and complexity of work performed." Mr. Al-Soufi listed a total of eleven tasks he performed during the 21 months he worked at Alpha. In sum, these tasks were:

Designed the composite metal deck for the Structural Renovation of Hotel Washington...performed deflection analysis, provided all connection details, checked compliance with UL codes, and supervised drawing production.

Designed the Compressed Air Bulkhead and Thrust Frame of the St. Claire River Tunnel...prepared a computer model using structural computer software STAAD-III to simulate water system of bulkhead, and checked shop drawings.

Designed the STAAD-III computer model to simulate excavation support system using Winkler's method of elastic foundation.

Investigated and prepared repair recommendation for the precast panels of Naval Hall.

Designed the rehabilitation of Gate 20 at Washington National Airport in accord with AISC, BOCA, and UL Codes.

Designed an antenna tower for Naval facilities in accord with the AISC code.

Prepared the as-built schedule for the construction of high occupancy vehicles ("HOV")lanes for the Virginia Department of Transportation ("VDOT").

Designed the excavation support system, provided all connection details, and supervised drawings production of the Grant Circle Shaft of the New Hampshire Avenue tunnel.

Designed the tunnel head support, provided all connection details, and supervised drawings production of the tunnel head support of the New Hampshire Avenue tunnel.

Designed the crossover structure, provided all connection details, and supervised drawings production of Greenbelt Route tunnel.

Designed a reinforced concrete waste water treatment box for Washington National airport.

On November 11, 1994, Mr. Edwin D. Itzig-Heine, Alpha's president at the time, verified the list by signing the reverse side of the form. Specifically, Mr. Itzig-Heine verified the "accuracy of the description, including extent and complexity of" Mr. Al-Soufi's listed experiences by responding that "the description and extent is accurate."

Also included with Mr. Al-Soufi's application were similar descriptions and verifications of his employment and experience with CME Engineering ("CME"), McGill University, and Al-Sahel Construction Company. While working as a CME structural engineer for seven months, Mr. Al-Soufi prepared the preliminary design for the Cumberland Gap Tunnel, which required him to calculate member sizes and dimensions, prepare a three-dimensional computer model using STAAD-III to analyze and design the frame under different load combinations, and prepare two-dimensional computer frame models to analyze various load combinations on critical frames. Mr. Al-Soufi's work for CME also included the design of a septic tank for an Army laboratory.

While working as a research assistant for McGill University for seventeen months, Mr. Al-Soufi performed numerous tasks. Most importantly, Mr. Al-Soufi investigated, analyzed, and designed bridge pier caps. As a research assistant, he also performed various engineering lab tests to calculate the strengths of concrete cylinders, and analyze the stress-strain curve and calculate the strength of reinforcing steel coupons.

Finally, as an assistant engineer for eight weeks with Al-Sahel Construction Company, Mr. Al-Soufi performed quality control by checking compliance with design plans, prepared concrete steel rebar specimens for lab testing, and performed field calculation for concrete mixture.

Upon review of the application, an engineering board member gave Mr. Al-Soufi two years credit for experience in light of his two masters degrees.

Virginia Board March 1995 Letter (CX 2)

On March 6, 1995, the Virginia Board informed Mr. Al-Soufi that he was not eligible to sit for the professional engineer examination because he did not yet have the requisite six years of engineering experience. The Virginia Board would not recognize Mr. Al-Soufi's undergraduate degree as an ABET approved degree based on the fact that his Master's degree from McGill University is not from an ABET approved school. However, the Board awarded Mr. Al-Soufi an additional year of experience credit for his second Master's degree, which gave him a total four years and eleven months experience.

American Society of Civil Engineers Guide to Employment Conditions (CX 3)

The American Society of Civil Engineers ("ASCE") Guide to Employment Conditions for Civil Engineers establishes professional grade descriptions to enable employers and employees to ascertain an individual's professional grade. Literal conformance with every item in the description is not necessary when there is a preponderance of evidence that the engineer exhibits the intended level of competence and responsibility.

A Level I/II engineer is considered to be at an entry level. An entry level engineer performs assignments designed to further develop his or her abilities and knowledge. For a Level I engineer, limited exercise of judgment is required on work details and in making preliminary selections and adaptations of engineering alternatives. An entry-level engineer receives close supervision on new aspects of assignments, and the supervisor screens assignments for unusual problems and selects techniques and procedures to be applied on non-routine work. The typical duties and responsibilities of an engineer at this level include using prescribed methods, performing specific and limited portions of a broader assignment of an experienced engineer, applying standard practices and techniques in specific situations, adjusting and correlating data, recognizing discrepancies in results, and following operations through a series of related detailed steps. An entry-level engineer may be assisted by a few aides, and has a bachelor's degree from an ABET accredited curriculum, or equivalent, plus appropriate continuing education. Job titles for an entry level engineer are "junior engineer" and "associate engineer."

Generally, a Level III engineer independently evaluates, selects, and applies standard engineering techniques, procedures, and criteria using judgement in making minor adaptations and modifications. This engineer's assignments have clear and specific objectives and require the investigation of a limited number of variables. To perform at this level, an engineer must have developmental experience in a professional position or equivalent graduate level education. The Level III engineer receives instructions on specific assignment objectives, complex features, and possible solutions. The engineer is given assistance on unusual problems and his/her work is reviewed for application of sound professional judgment. The typical duties of a Level III engineer involve performing work that involves conventional types of plans, investigations, surveys, structures, or equipment with relatively few complex features for which there are precedents. Assignments usually include one or more of the following aspects: equipment design and development, material testing, preparation of specifications, process study, research investigations, report preparation, and other activities limited in scope requiring knowledge of principles and techniques commonly employed in the specific narrow area of assignments. An engineer at this level may supervise

or coordinate the work of draftspersons, technicians, and others who assist in the specific assignments. A Level III engineer has the same minimum educational requirements as a Level I engineer. Finally, a level III engineer's job titles include "engineer," "assistant engineer," and "design engineer."

U.S. DOL Bureau of Labor Statistics Occupational Compensation Survey (CX 4)

In January 1994, the DOL is Bureau of Labor Statistics Bulletin 3075-7: Occupational Compensation Survey for Washington, D.C.-Maryland-Virginia, Metropolitan Area ("BLS Survey"). According to the BLS Survey, the mean weekly earnings for a Level I engineer in private industry is \$605. The middle range is \$526-\$670. For a Level III engineer in private industry, the mean weekly earnings is \$902, and the middle range is \$804-\$996. According to the BLS Survey, the general characteristics of a Level I engineer are performing assignments designed to develop professional work knowledge and abilities. This engineer is at the beginning professional level and may even receive classroom type training. A Level I engineer works under close supervision, receives specific and detailed instructions as to required tasks and expected results, and has their work checked for progress and reviewed for accuracy upon completion. The entry-level engineer performs a variety of routine tasks that are planned to provide experience and familiarization with the engineering staff, methods, practices, and programs of the employer. On the other hand, a Level III engineer performs more complex duties (the BLS Survey then listed the duties and expectations of a Level III engineer as found in the ASCE Guide described in CX 3).

Mr. Al-Soufi's Application for Employment (CX 5)

On March 9, 1993, Mr. Al-Soufi applied for employment as a civil engineer with Alpha. He noted on the application that his desired salary was \$30,000. Mr. Al-Soufi also marked the "yes" box next to the question, "Are you either a U.S. citizen or an alien authorized to work in the United States?" The application recorded Mr. Al-Soufi's educational achievements as a: B.S. in civil engineering from Middle East Technical University, Master's Degree in Structural Engineering from McGill University and a Master of Science Degree in Construction Engineering and Management from University of Maryland. Mr. Al-Soufi listed his previous engineering employment as a structural engineer with CME Engineering, Inc. from September 1991 through March 1992, and a teaching assistant/ lab supervisor with McGill University from May 1989 through September 1990.

Mr. Al-Soufi's Undated Resume (CX 6)¹²

Mr. Al-Soufi's undated resume lists his experience and education before his employment with Alpha. Specifically, Mr. Al-Soufi was a structural engineer for CME Engineering from September 1991 through March 1992. While employed at CME, Mr. Al-Soufi performed the computer modeling, structural analysis, and the preliminary design phases of the Cumberland Gap, Tennessee Portal Building; prepared a drainage study for the U.S. Army; prepared a cost estimate for a roof replacement for the U.S. Army;

¹²The resume references his expected graduation from the masters program at the University of Maryland in December 1992.

and participated in the design of a new roof for the U.S. Army. Previous to his employment with CME, Mr. Al-Soufi was a teaching assistant and laboratory supervisor in the Department of Civil Engineering and Applied Mechanics at McGill University from May 1989 through September 1990. As a teaching assistant, Mr. Al-Soufi designed and tested bridge pier caps, concrete mixing, casting, curing, and fabricating steel forms. Mr. Al-Soufi listed his educational achievements as: Master's Degree in Construction Engineering and Management from the University of Maryland, Master's Degree in Structural Engineering from McGill University, and a B.S. in Civil Engineering from Middle East Technical University. While at McGill University, Mr. Al-Soufi authored a master's thesis entitled "The Response of Reinforced Concrete Bridge Pier Caps."

December 20, 1993 Memo to Mr. Itzig-Heine and Mr. Surinder (CX 7)

On December 20, 1993, Mr. Al-Soufi wrote a memo to Mr. Itzig-Heine and a nearly identical letter to Mr. Surinder, regarding a misunderstanding as to Mr. Al-Soufi's assignment. Specifically, Mr. Al-Soufi wrote, "[s]ince most of my duties at Alpha falls into design, I shall assume that I report directly to you and/or Surinder. Therefore, if I have a task with another task leader, I will kindly ask him to arrange for the matter directly with you. By no means this memo implies that I like to work for one task leader over the other. It is a pleasure to me to work for every task leader at Alpha."

March 4, 1994 Letter to Mr. Itzig-Heine (CX 8)

On March 4, 1994, Mr. Al-Soufi wrote a letter to Mr. Itzig-Heine seeking Mr. Itzig-Heine's feedback on his work. Mr. Al-Soufi said, "[d]uring the last year, I was fortunate to work with you, Surinder and other project managers. I have the opportunity to earn a little bit of your experience. Also, I have become very familiar with the steel code, PCI code, design notes preparation and drawing productions. . . every project manager or any of Alpha's clients who I had the chance to work with will speak highly of my work."

May 25, 1995 Letter to Mr. Itzig-Heine (CX 9)

Mr. Al-Soufi submitted his letter of resignation to Mr. Itzig-Heine on May 25, 1995 stating his intention to resign his post as an engineer effective June 9, 1995. While Mr. Al-Soufi "acquired a great deal of experience" with Alpha, he believed his "career objectives were no longer consistent with the current work load forecast."

Mr. Al-Soufi's Resume Provided to Alpha March 2, 1993 (CX 10)

Mr. Al-Soufi gave this resume to Alpha at his interview on March 2, 1993. The only major change between this resume and the undated resume at CX 6 is Mr. Al-Soufi's statement that he is a "U.S. Permanent Resident."

Sworn Testimony of Mr. Jeffrey Lindsey

Mr. Jeffrey Lindsey is the Chief Executive Officer (“CEO”) of Alpha Corporation and has held that position since 1994 (TR, page 58). Mr. Lindsey began working for Alpha in 1980, and has functioned as an entry-level engineer, task leader, project manager, civil engineer, and vice president (TR, pages 58 and 59). When Mr. Al-Soufi was hired in March 1993, Mr. Lindsey was vice president of Alpha, and actively hired Mr. Al-Soufi (TR, page 59). Mr. Al-Soufi approached Alpha as a walk-in and applied for a job as an entry-level engineer, even though the employment application does not refer to the position of engineer as “entry level” (TR, pages 62 and 69). Mr. Al-Soufi was hired at entry-level because he lacked a substantial amount of experience and, as with all their entry-level hires, Alpha anticipated training him (TR, page 76). Alpha does not consider a Master in Engineering as substitute for the real world experience necessary to be hired in a higher position than entry-level (TR, pages 81-83). In addition, a Master’s degree is not determinative of quicker promotion (TR, page 123). There is no standard for promotions; how quickly engineers climb the ladder depends on the individual. On average, engineers remain entry-level for three to five years (TR, page 121).

Concerning whether a masters’ degree in engineering is the equivalent of months or years of experience, Mr. Lindsey stated, “there is no such thing literally in my entire career in having hired probably or been involved in the process of hiring the majority of engineers for the firm there really is no correlation whatsoever” (TR, page 82). At the same time, Mr. Lindsey acknowledged that Alpha “may have” published a vacancy notice (PX 2) seeking a scheduling engineer with a bachelors in civil engineering and three years construction engineering experience. The notice indicated that a Master’s Degree in engineering, preferably construction engineering and management, could be substituted for the three years engineering experience requirement (TR, pages 89-92).

Although Mr. Al-Soufi was hired as an “engineer,” all “engineers” at Alpha are entry-level. Alpha’s rigid hierarchical structure starts with an engineer, then task leader, project manager, senior engineer, and finally an officer of the corporation (TR, page 63). Task leaders correspond to Level III engineers, while entry-level engineers are Level I/II engineers. The main difference between task leaders and entry-level engineers is that task leaders have some supervisory responsibilities, while entry-level engineers do not, but are instead focused on learning the engineering principals and codes (TR, pages 119 and 120). Mr. Al-Soufi was very aware of this structure, and his place in it as an entry-level engineer working under task leaders. In his December 1993 memo (CX 7) to Mr. Itzig-Heine, Mr. Al-Soufi refers to having tasks with task leaders (TR, page 63). And, Mr. Al-Soufi recorded his performance of the most basic functions of entry-level engineers in his March 1994 letter to Mr. Itzig-Heine (CX 8), in which he refers to becoming familiar with the steel code, PCI code, design notes preparation, and drawing production (TR, pages 64 and 65).

For five to six months in 1993 and 1994, Mr. Lindsey was Mr. Al-Soufi’s direct supervisor, and, as such, became very familiar with his work. Generally, while under Mr. Lindsey’s supervision, Mr. Al-

Soufi performed construction inspection, document investigation related to scheduling, and some design. Regarding Mr. Al-Soufi's designing tasks, he was part of an engineering team who designed a support of excavation design; Mr. Al-Soufi performed the calculations as part of the design. Mr. Al-Soufi never performed anything independently without regular supervision. In one construction management project supervised by Mr. Lindsey, Mr. Al-Soufi worked on a team of about twenty, which included eight entry-level engineers. In the one day he worked on the project, Mr. Al-Soufi performed construction inspection; specifically, he reviewed construction activities performed by the contractor and evaluated whether the activities complied with the plans. Mr. Al-Soufi had to report to several senior engineers on the job (TR, pages 124-126). When Alpha filed the LCA in August 1994, after it had employed Mr. Al-Soufi for a year and a half, Mr. Al-Soufi was still working in an entry-level position and his work was characterized as "average" (TR, page 94).

Mr. Al-Soufi did accurately account for his work with Alpha on his application form for licensing with the Virginia Board. However, the form *does not* describe tasks or projects which Mr. Al-Soufi completed *by himself*. Rather, the form describes the responsibilities of Alpha in each project and that Mr. Al-Soufi engaged in these activities *as a member of a team* (TR, pages 66, 79, 106, and 107). While Mr. Al-Soufi used such terms as "designed" and "investigated," rather than stating he was part of a team, the top of the form asks the engineer to define "projects for which he/she had full or partial responsibility." Alpha characterizes partial responsibility as being a member of a team performing the task (TR, page 115). Thus, these descriptions correctly describe not duties of the individual, but instead, the responsibility that Alpha had on that project (TR, page 80). For instance, Mr. Al-Soufi was part of a team that designed an excavation support system and crossover structures, prepared an as-built schedule, and conducted investigations (TR, pages 103 to 109). While Mr. Lindsey testified that an entry-level engineer cannot do all the tasks listed, but must work as part of a team to accomplish them, he also testified that Alpha would not give an engineer partial responsibility for a task that an engineer could not accomplish on their own (TR, pages 109 and 115). Finally, Mr. Al-Soufi may have provided some connection details by himself, but did not provide any supervision while in the firm (TR, page 102 and 103).

For the Respondent

April 1999 VEC Determination (RX 1)

On April 16, 1999, the VEC determined that Mr. Al-Soufi's performance while employed at Alpha, based on his job description, warranted a Level III engineer annual salary of \$46,904. Relying on the BLS Survey, the VEC reasoned that Mr. Al-Soufi's job description, which included a list of work certified by Alpha, contained tasks more complex and diverse than simply routine or part of a sequence of related engineering tasks (for example, the preliminary and final design of heavy construction, such as excavation support systems and crossover structures used in tunnel construction). The VEC's letter also included a notice of appeal rights based on the JSCS. Specifically, a party could pursue an appeal through the State Monitor Advocate, then to a State Hearing Official, then to the Regional Administrator of the U.S. DOL, and finally to a U.S. DOL Administrative Law Judge.

August 1999 Regional Administrator Determination (RX 2)

The RA notified Alpha on August 5, 1999 that the VEC had referred Alpha's appeal dated May 14, 1999 to the RA's office for a determination. The RA concurred with the VEC that the work performed by Mr. Al-Soufi while employed at Alpha corresponds to the job duties of a Level III engineer, and that the prevailing rate for a Level III engineer in 1994 was \$46,904 per year. The RA noted that while employed by Alpha, Mr. Al-Soufi performed computer modeling of structures, preliminary and final design of structural systems of heavy civil construction, prepared as-built schedules of construction activities, construction cost estimates, and investigated construction claims. The RA reasoned that these duties were more complex than Level I engineer tasks and matched the duties of Level III engineers as described in the ASCE Guidelines.

Procedural History Documents (RX 3)

In chronological order, this exhibit contains Mr. Al-Soufi's November 1994 application to the Virginia Board, and the Virginia Board's March 1995 denial, which I have already summarized as CX 1 and CX 2. The next document is the Administrator's October 28, 1997 determination finding violations of Alpha's LCA, including failure to provide notice of the filing of the LCAs and to comply with the provisions of subpart H or I of 20 C.F.R. § 655 by not developing appropriate documentation to establish the prevailing wage. Alpha also willfully failed to pay wages as required and misrepresented a material fact on the LCA. The Administrator fined Alpha and ordered it to reimburse Mr. Al-Soufi \$3,808.06 in back-wages. The Administrator also took similar remedial action on behalf of the other two non-immigrant foreign worker complainants.

However, on October 14, 1998, the Administrator replaced the October 1997 determination with a revised determination. The Administrator still found violations similar to its previous findings, such as failure to develop appropriate evidence to establish the prevailing wage, failure to post notice of filings of LCAs, and misrepresentation of a material fact on the LCA, but no longer required Alpha to reimburse Mr. Al-Soufi with back-pay. Regarding the other two complainants, the Administrator maintained its determination that Alpha failed to pay them the required wages and consequently owed them back-pay.

Alpha submitted its Pre-Hearing Submission, Pre-Hearing Brief, Motion for Joinder, and List of Witnesses to the OALJ on January 28, 1999 in the matter of 1999-LCA-2. Alpha first argued that its actual wage determination is accurate. According to Alpha, on April 30 and May 2, 1996, Alpha submitted to the Administrator a list of the salaries of non-H-1B employees with comparable experience to Mr. Al-Soufi. Yet, the Administrator never found that Alpha failed to comply with 20 C.F.R. § 655.731(a)(1) regarding actual wages. Second, Alpha asserted that the prevailing wage determination made by the DOL is accurate. In July 1998, the VEC acknowledged that Level I of the Bureau of Labor Statistics Survey was the appropriate level for entry level engineering jobs instead of the Level II it previously used. Mr. Al-Soufi was paid more than the \$609 per week required by the Survey of Level

I engineers. Finally, Alpha argued that Mr. Al-Soufi is not due back-wages. Contrary to Mr. Al-Soufi's contentions, he was not due any compensation after discharge because he was not available to work after tendering his two week notice of resignation on May 26, 1995.

On March 10, 1999, Mr. Al-Soufi sent a letter to Ms. McCall, counsel for the Administrator, in support of his claim as a Level III engineer.¹³ In this letter, Mr. Al-Soufi described his two year, two months' employment experience before joining Alpha. Specifically, Mr. Al-Soufi spent seven months as a structural engineer with CME, where he did three-dimensional computer modeling of a building frame, and analyzed two-dimensional building frames under various load combinations. Mr. Al-Soufi also spent one year and five months as a research assistant at McGill University, where he conducted various engineering lab testing, computer modeling and testing of bridge piers, and carrying experimental work on complex and heavily-instrumented specimens. Finally, Mr. Al-Soufi had eight weeks experience as an assistant engineer. Mr. Al-Soufi argued that based on this experience, and his education (not including his bachelor's degree from a non-ABET approved school), in December 1994, the Virginia Board of Professional Engineers approved four years and eleven months of experience, which translates into four years and seven months of approved experience when Alpha filed the LCA in August 1994. This experience did not meet Virginia's six year minimum requirement. However, in 1995, Mr. Al-Soufi became a Licensed Professional Engineer in Maryland, which did not have the six year requirement.

Mr. Al-Soufi described his employment at Alpha as including computer modeling of structures, renovation of building facilities, preliminary and final design of structural systems of heavy civil construction such as excavation support systems and crossover structures which are typically used in tunnel construction. Additionally, Mr. Al-Soufi was responsible for preparing as-built schedules of construction activities, construction cost estimates, and investigating construction claims. Mr. Al-Soufi also supervised draftspersons responsible for generating the computer aided drawings. The description of these responsibilities was certified by Mr. Itzig-Heine, the president of Alpha. Mr. Al-Soufi's letter concluded that his duties at Alpha, as well as his education, meet and exceed those of a Level III engineer as described by the ASCE.

On April 2, 1999, the RA forwarded Mr. Al-Soufi's appeal to the VEC pursuant to 20 C.F.R. § 655.731, which requires such determinations to be appealed through the Employment Service Complaint System (JSCS). Consequently, on April 16, 1999, the VEC determined that Mr. Al-Soufi's duties warranted the salary of a Level III engineer (*see* RX 1).

Alpha requested a hearing with the State Monitor Advocate of the VEC to challenge the VEC's determination on May 14, 1999. Alpha argued that the Virginia Board of Professional Engineers' licensing determination, which accounted for four years and seven months of experience when the LCA was filed,

¹³At the February 1999 hearing, I had instructed Mr. Al-Soufi to send his "appeal" of the VEC's Level I determination to Ms. McCall, who would then forward his appeal to the appropriate agencies.

has no bearing on Alpha's occupational requirements. Discounting education, which the board took into account and Alpha *does not* equate to experience, Mr. Al-Soufi only had two years of experience when the LCA was filed. And, since most of this experience was gained with Alpha, Alpha closely observed Mr. Al-Soufi's work, and reasonably decided, based upon its observations, that Mr. Al-Soufi was performing entry-level work when the LCA was filed. Even if Mr. Al-Soufi can show four years and seven months experience, he still cannot demonstrate that his duties were anything other than entry level when the LCA was filed.

In response to Alpha's May 14, 1999 request, as per instructions by the RA, the State Monitor Advocate of the VEC forwarded Alpha's appeal to the RA on May 18, 1999. The RA concurred with the VEC on August 5, 1999, finding that Mr. Al-Soufi's responsibilities corresponded with the ASCE guidelines for Level III engineers. Alpha requested a hearing with the OALJ on August 27, 1999, arguing that Mr. Al-Soufi's duties did not correspond to those of a Level III engineer.

Alpha's Appeal of the 1997 VEC Determination (RX 4)

On February 23, 1998, Alpha appealed the VEC's 1997 prevailing wage determination to the RA of the ETA. Alpha contended that the VEC's wage survey for civil engineers was fatally flawed because it is higher than the wages for civil engineers dictated by the Bureau of Labor Statistics Occupational Outlook Handbook and the Bureau of Labor Statistics January 1994 Occupational Compensation Survey Bulletin 3075-7 for the Washington D.C.- Maryland- Virginia Metropolitan Area. Additionally, the VEC mistakenly used the rate of pay for Level II engineers, when it should have used the Level I rate for entry level engineers.

VEC's July 1998 Revised Determination (RX 5)

On July 16, 1998, the VEC revised its determination and concluded that the Level I wage is to be used for entry level engineering jobs, not the Level II salary which was originally provided to Alpha.

LCA (RX 6)

On August 18, 1994, Alpha submitted a LCA concerning Mr. Al-Soufi. The LCA was certified the next day. The certified LCA indicates Mr. Al-Soufi's rate of pay at \$31,000 per year. In addition, the document contains Alpha's promise to abide by the Labor Conditions applicable to H-1B non-immigrant employees, including paying Mr. Al-Soufi the higher of the actual or prevailing wage, providing working conditions that are not adverse to those of other employees, preventing labor related lockouts or strikes, and giving notice of the filing of the LCA.

I-129 Application (RX 7)

On September 8, 1994, Alpha sent an I-129 application on behalf of Mr. Al-Soufi to the INS.

According to Alpha, Mr. Al-Soufi was holding H-1B status which expired on September 23, 1994. Mr. Al-Soufi was also approved for U.S. permanent residency through his parents as of August 28, 1991. Alpha stated that Mr. Al-Soufi's responsibilities at Alpha include: "design of tunnels, excavation support systems and major building renovations, as well as computer aided structural design. His responsibilities also include analysis of construction claims as well as scheduling." The application was signed by Mr. Itzig-Heine.

For the Party-In-Interest

Document Compilation (PX 1)

[PX 1 is a compilation of documents already admitted into evidence plus additional procedural letters. These documents include Mr. Al-Soufi's March 1999 letter to Ms. McCall, the Administrator's October 1997 determination letter, the Administrator's October 1998 revised determination letter, Alpha's January 1999 Pre-Hearing Brief, Submission, Motion for Joinder, and List of Witnesses, the Virginia Board's March 1995 letter to Mr. Al-Soufi, Mr. Al-Soufi's application for licensing as a Professional Engineer, and ASCE Guidelines.]

Alpha's Vacant Position Advertisement (PX 2)

On September 8, 1995, Alpha advertised a vacant position for a scheduling engineer. Alpha listed the qualifications required for the positions as, "BS in Civil Engineering with 3 years construction engineering experience. The experience may be substituted by a Masters' Degree in engineering, preferably in Construction Engineering and Management." Alpha described the duties of the scheduling engineer as construction project scheduling using various computer software, claim analysis, and construction management.

Sworn Testimony of Mr. Sami Al-Soufi

Approximately one week before he started working with Alpha on March 9, 1993, Mr. Al-Soufi was interviewed by Mr. Itzig-Heine (president of Alpha), Mr. Singh (executive vice-president), and Mr. Angelitis (marketing manager) for a structural engineer position (TR, pages 131-134). Mr. Al-Soufi did not interview with Mr. Lindsey, and the interviewers did not describe the position as "entry-level." During the interviews, Mr. Al-Soufi presented his work and educational experience as described in his resume and disclosed that he was approved for permanent residency through his parents and had a valid work permit from CME until September of 1994. Even though Mr. Al-Soufi was not yet a permanent resident (he was only approved for permanent residency), he noted on the resume he gave to Alpha that he had permanent residency status. The resume did not clarify that his permanent residency status was *pending* (TR, pages 160-162).

Subsequently, Mr. Angelitis telephoned Mr. Al-Soufi, offering him a job for \$30,000 per year,

which Mr. Al-Soufi accepted (TR, page 133). According to Mr. Al-Soufi, he did not ask for \$30,000, but rather was offered, and subsequently accepted, \$30,000 from Mr. Angelitis. On his application, Mr. Al-Soufi wrote \$30,000 in the “salary requested” box to reflect the amount offered him by Mr. Angelitis (TR, pages 153-155). After he left Alpha and worked for another contractor, Mr. Al-Soufi realized that his work at warranted a salary of about \$40,000. While working for Alpha, Mr. Al-Soufi also believed his work, which was more complex than that of the other engineers, warranted a higher salary. But, because of his personality, Mr. Al-Soufi did not ask for a raise. It was not until he was employed by another contractor after Alpha that Mr. Al-Soufi realized his work deserved a salary in the \$40,000 range. (TR, pages 142 and 143).

In August 1994, after Mr. Al-Soufi had worked for Alpha for seventeen months, Mr. Al-Soufi asked Alpha to obtain a new H-1B visa for him because his H-1B visa from CME was due to expire in September 1994. Between March 1993 and August 1994, Alpha did not know Mr. Al-Soufi would need another H-1B visa (TR, page 164). Mr. Al-Soufi worked for Alpha until March 1995 when he resigned (TR, pages 131-134).

During the two years Mr. Al-Soufi worked for Alpha, he was given assignments by project managers, namely Mr. Itzig-Heine and Mr. Singh. If Mr. Al-Soufi was not completing tasks for Mr. Itzig-Heine or Mr. Singh, he would work for other task leaders, such as Mr. Lindsey. Project managers are also known in the industry as “task leaders,” which is how Mr. Al-Soufi referred to Mr. Itzig-Heine and Mr. Singh in his December 1993 memo. Alpha is organized as engineers, senior engineers, and managers. Mr. Al-Soufi was not aware of a task leader position; instead, the project managers served as task leaders (TR, page 141). Task leaders, or project managers, are responsible for planning and executing a project. Mr. Al-Soufi never planned or executed projects (TR, pages 158-159).

Mr. Itzig-Heine and Mr. Singh regularly met with Mr. Al-Soufi and checked his final work. During the early part of his employment with Alpha, Mr. Al-Soufi was part of a team of two or three persons that did not meet regularly and were always led by the project managers. Over the course of his employment, Mr. Al-Soufi’s work was focused on design. For instance, Mr. Itzig-Heine or Mr. Singh would explain a project to Mr. Al-Soufi, who would then perform the calculations, develop the associated sketches, and present his sketches to the CAD drafters, who would then draft the design for the project manager. Sometimes, Mr. Al-Soufi supervised the CAD drafters by editing or correcting their designs. Mr. Al-Soufi also investigated construction projects during his employment. For instance, he conducted a structural investigation of the balconies of a Naval Building. During this investigation, Mr. Al-Soufi worked with a senior engineer who was the project manager, and, incidentally, they conducted an inspection of the as-built condition of the entire building. As an example of his complex work, in late 1994, following the instructions of project managers, Mr. Al-Soufi prepared calculations that a couple engineers subsequently used. And, Mr. Al-Soufi supervised these engineers by checking their calculations. Mr. Al-Soufi’s calculations were approved by Mr. Itzig-Heine or Mr. Singh (TR, pages 135 to 141, 150, and 160).

As part of his application for his professional engineer license, Mr. Al-Soufi listed eleven tasks he

performed while under Alpha's employ. Mr. Itzig-Heine, the principal-in-charge, approved this list without comment. On most of the tasks listed, Mr. Al-Soufi worked with a principal in charge, and, if the project was very big, a senior engineer as well. Mr. Al-Soufi performed the "bulk" of the work on most of the tasks, which he characterized as over 75% of the responsibilities. For instance, he performed 75% of the work on the design for the composite metal deck for the structural renovation of Hotel Washington, 75% of the dead and live load deflection analysis, 75% of all connection details, and 75% of the supervision of the drawing productions. However, Mr. Al-Soufi and Mr. Itzig-Heine each performed 50% of the work on the design of the compressor, bulkhead, and thrust frame of the Saint Clair River Tunnel (TR, pages 146, 147, and 155-157).

When VEC was re-considering his qualifications, Mr. Al-Soufi provided VEC, through Ms. McCall, his education credentials and a copy of his professional engineer application (CX 1) (TR, page 144).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Stipulations of Fact

At the hearing, the parties stipulated to the following findings of fact: 1) it was appropriate for the Virginia Employment Commission ("VEC") and the Regional Administrator ("RA") of the Employment and Training Administration to rely on the 1994 Bureau of Labor Statistics Occupational Survey for Engineers ("BLS Survey") to establish a prevailing wage; and 2) the prevailing wage determination made by the VEC and RA for engineer levels one, two, and three are correct (TR, pages 39-43).

Parties' Positions

Complainant

Alpha Corporation asserts that Mr. Al-Soufi was an entry level engineer, or a Level I or II engineer (TR, pages 9, 10, 15, 16, and 18). In the alternative, even if Mr. Al-Soufi was not an entry level engineer, based on his credentials, he was nevertheless employed as an entry level engineer at Alpha Corporation.

Respondent

The DOL believes the RA's determination that Mr. Al-Soufi was a Level III engineer with an annual salary of \$46,904 is appropriate (TR, pages 17 to 19). In making the determination, the RA relied on VEC's determination which was based on Mr. Al-Soufi's diverse and sophisticated duties while employed by Alpha. There is no dispute that a Level III engineer's prevailing wage was \$46,904.

Party-In-Interest

Mr. Al-Soufi maintains that he was a Level III engineer at Alpha (TR, pages 31 and 31). He points out that after reviewing his qualification information, the VEC agreed with the Level III designation.

Discussion

As the complainant, Alpha is seeking relief from the RA's determination that Mr. Al-Soufi was a Level III engineer with an associated prevailing wage of \$46,904. Consequently, the company must prove, by a *preponderance* of the evidence, that the RA's finding that Mr. Al-Soufi was a Level III engineer is not appropriate. Based on the parties' stipulation, the 1994 BLS Survey (CX 4), which incorporated most of the duties and responsibilities set out by the American Society of Civil Engineers Guide to Employment Conditions (CX 3), provides a significant benchmark for evaluating the evidence relating to this issue. According to that survey, the following two essential factors discriminate between a Level I engineer, Level II engineer, and Level III engineer: 1) education/experience and 2) job responsibility.

Education/Experience

In terms of education, a Level I, or entry level, engineer is an engineer who requires additional training and has little or no practical experience. The primary purpose of his or her employment at this stage is education. Work assignments are tailored to ensure the engineer develops "professional work knowledge and abilities" (CX 4, page B-9). In fact, the employment conditions may even include classroom instruction. A Level II engineer is also considered to be entry level. The engineer's requisite education includes the experience gained as a Level I engineer or "appropriate graduate level study" (CX 4, page B-9). In addition, the engineer may be assigned tasks for "training and development purposes." A Level III engineer has completed most of his or her training and has "developmental experience in a professional position or equivalent graduate level education" (CX 4, B-10).

Prior to his employment with Alpha, Mr. Al-Soufi had completed two graduate level programs in engineering, earning a Master's Degree in structural engineering and a Master's Degree in construction engineering and management. Having completed the degree requirements for both programs, Mr. Al-Soufi clearly engaged in more than "graduate level study." Rather, Mr. Al-Soufi had university credentials establishing "graduate level education." I also note that during his employment with Alpha, Mr. Al-Soufi was not given classroom training or instruction. In terms of education, I find Mr. Al-Soufi had the education level consistent with a Level III engineer.

Concerning the characterization of Mr. Al-Soufi's engineering experience, Mr. Lindsey maintains Mr. Al-Soufi was an entry level engineer because he lacked substantial experience. Not only did Mr. Al-Soufi have little "real world" experience when he started working for Alpha, Mr. Lindsey asserted Alpha Corporation does not consider graduate level education an appropriate substitute for "real world" work experience (TR, page 81).

Mr. Lindsey's characterization of Mr. Al-Soufi as an inexperienced engineer is not convincing for

two reasons. First, although relatively inexperienced in practical terms at the start of his Alpha employment, Mr. Al-Soufi had worked successfully for Alpha for another 17 months as an engineer prior to Alpha's submission of the LCA in August 1994. As a result, by the time of the LCA submission, Mr. Al-Soufi had over two years of practical engineering experience.

Second, although Mr. Lindsey does not believe a graduate level engineering degree is a substitute for experience, the American Society of Civil Engineers (CX 3, page 10), the Virginia Board of Professional Engineers (CX 1, page 2), and Alpha Corporation consider a graduate engineering degree the equivalent of some engineering experience. Contrary to Mr. Lindsey's assertion, I find Alpha's advertisement (PX 2)¹⁴ clearly demonstrates that Alpha Corporation will substitute a "Masters' Degree in engineering, preferably in Construction Engineering and Management" for "3 years construction engineering experience." Mr. Al-Soufi not only had the specified Master's Degree in construction engineering and management, he also possessed a second advanced degree in structural engineering when he arrived at Alpha. This significant graduate level experience, especially in combination with both the company's willingness to trade an advanced engineering degree for practical experience, and Mr. Al-Soufi's subsequent nearly year and a half years of additional practical engineering work at Alpha, impeaches Mr. Lindsey's characterization of Mr. Al-Soufi's engineering status as inexperienced.

Based on the combination of his employment with CME Engineering and Alpha through August 1994, as augmented by experience credit for his two graduate engineering degrees, Mr. Al-Soufi had the equivalent of nearly five years of engineering experience. That cumulative total falls just one year short of the six year experience threshold necessary for an engineer to take the "professional engineer" examination in Virginia (CX 2). Notably, according to the ASCE, once an engineer becomes a "registered professional engineer," he or she may be considered a Level IV engineer (CX 3). In other words, not only had Mr. Al-Soufi moved beyond the experience levels associated with Level I and Level II engineers, he was just one year shy of the experience threshold for a Level IV engineer. In consideration of all the above factors, I find Mr. Al-Soufi had both the education and experience necessary to support a determination that he was Level III engineer.

¹⁴Mr. Gonzalez-Perez objected to the admission of PX 2 on the grounds that it was not authenticated (TR, page 93). I over-ruled the objection. Mr. Lindsey acknowledged that Alpha periodically advertises to fill scheduling engineer vacancies and candidly did not deny that advertisement came from Alpha (TR, pages 91 and 92). Mr. Gonzales-Perez also questioned the relevance of the advertisement since it was dated nearly a year after the LCA submission and thus didn't reflect Alpha's position concerning advanced degrees at the time of the LCA. I disagree. In response to questions about the factors Alpha considered in hiring engineers, Mr. Lindsey stated, without any qualifying dates, that Alpha does not factor in education in determining experience (TR, page 82). During his entire career at Alpha, since 1980, Mr. Lindsey never considered a Master's Degree the equivalent of any length of engineering experience (TR, page 83). But, when I asked Mr. Lindsey whether Alpha "ever" used an announcement substituting education for engineering experience, he replied, again without any qualifying dates, "[w]e may have" (TR, page 92). In addition, Mr. Lindsey gave no indication that the advertisement somehow reflected a change in policy that occurred after August 1994 concerning the graduate degree-experience equivalency. In light of these factors, I find PX 2 relevant and probative on whether Alpha considered education a substitute for experience at the time of the LCA submission.

Job Responsibility

The basic job responsibility for a Level I engineer is to learn the craft. An entry level engineer is assigned routine tasks for the purpose of providing experience and familiarization with engineering systems. A Level II engineer assumes greater responsibility by performing “limited portions of a broader assignment of an experienced engineer” (CX 4, page B-9). The engineer is expected to accomplish routine tasks by applying standard techniques and practices. Limited engineering judgment is required. Finally, a Level III engineer applies engineering judgment to independently accomplish defined assignments. Assignments may include “equipment design and development, tests of materials, preparation of specifications, process study, [and] research investigations” (CX 4, page B-10).

In the area of job responsibility, the dispute between Mr. Lindsey and Mr. Al-Soufi focused on the tasks Mr. Al-Soufi listed in his professional engineer registration application (CX 1). In his application, Mr. Al-Soufi set out 11 engineering assignments that included engineering design work, investigation of structural failures and preparation of engineering schedules. These tasks fit the noted assignments suitable for a Level III engineer. And, while acknowledging he was part of an engineering team for some of the assignments, Mr. Al-Soufi asserted he was the principal-in-charge and actually accomplished 75% of the work.

Mr. Lindsey disagrees and first notes that under Alpha’s organizational structure, Mr. Al-Soufi was an entry level engineer who worked for a task leader. Within this system, entry level engineers are closely supervised by the task leaders, who are at least Level III engineers. Consequently, Mr. Al-Soufi never conducted any independent work. Also, Mr. Al-Soufi’s correspondence (CX 7 and CX 8) reflects his understanding of the organization and he describes the basic work functions of an entry level engineer. Mr. Lindsey also asserts that the assignments Mr. Al-Soufi listed on his professional engineer registration application do not reflect his individual work. Instead, the tasks reflect the responsibilities of Alpha for each project.

Because Mr. Lindsey actually supervised Mr. Al-Soufi for a period of time, he was in an excellent position to describe the extent of Mr. Al-Soufi’s job responsibilities. However, his detailed assessment is somewhat diluted by the representations of Mr. Itzig-Heine, who also supervised Mr. Al-Soufi. Despite Mr. Lindsey’s argument to the contrary, Mr. Itzig-Heine certified in November 1994 on Mr. Al-Soufi’s application that Mr. Al-Soufi had at least partial responsibility for the listed 11 engineering assignments (CX 1). In addition, since the purpose of the application was to demonstrate Mr. Al-Soufi’s professional experiences for determining whether he should be registered as a professional engineer, I do not consider Mr. Itzig-Heine’s certification to mean Mr. Al-Soufi was only part of team that accomplished the enumerated tasks. Instead, Mr. Itzig-Heine was certifying Mr. Al-Soufi’s ability to perform the cited engineering tasks. Mr. Itzig-Heine also confirmed Mr. Al-Soufi’s competence when he certified the INS application in September 1994 (RX 7). According to Mr. Itzig-Heine, Mr. Al-Soufi was responsible for

engineering design, analysis and scheduling. And, as a final note, even Mr. Lindsey eventually agreed that while Mr. Al-Soufi did not have full responsibility for the listed tasks on the professional engineer examination application, he could accomplish them. Ultimately, I conclude Mr. Al-Soufi did accomplish, in part, each of the 11 engineering tasks or projects described in the professional engineer application. And, comparing these tasks with the Level III engineer assignments, I find the work accomplished by Mr. Al-Soufi had the sufficient complexity to qualify as Level III engineer work and reasonably supported a Level III engineer determination.

Finally, concerning Mr. Lindsey's strong assertion that Mr. Al-Soufi did not apply the independent judgment associated with a Level III engineer, I agree that Mr. Al-Soufi was not completely independent in his completion of the 11 tasks. Mr. Al-Soufi worked within a system of task leaders. These task leaders were experienced engineers with the ultimate responsibility for successful completion of assigned tasks or projects. Consequently, in the area of independent engineering judgment, Mr. Al-Soufi seems to fall short of that Level III engineer characteristic.

Summary

Of the discriminating factors between entry level engineer and Level III engineer, I find that Mr. Al-Soufi had the education/experience associated with a Level III engineer. Likewise, concerning job responsibility, Mr. Al-Soufi satisfactorily accomplished Level III engineering tasks. Although Mr. Al-Soufi did not necessarily accomplish those complex tasks using the independent judgment associated with a Level III engineer, I find in this case that the exercise of independent judgment less probative in determining whether Mr. Al-Soufi was a Level III engineer. Based both on educational background and engineering experience, Mr. Al-Soufi demonstrated sufficient engineering competence to accomplish Level III engineer tasks. In light of the complexity of the various engineering tasks Mr. Al-Soufi completed, the absence of independent judgment appears to be a function of Alpha's strict hierarchical organization rather than Mr. Al-Soufi's inability to carry the responsibility of independent judgment. In other words, because Mr. Al-Soufi completed the complex engineering tasks set out in the professional engineer application, he certainly demonstrated the potential to exercise the requisite independent judgment. In addition, considering Alpha has the burden of proof in this case and in the absence of evidence showing Alpha withheld the exercise of judgment from Mr. Al-Soufi due to his inability to handle it, I find the determination that Mr. Al-Soufi was a Level III engineer based on his education, experience, and completion of complex engineering tasks was appropriate. Having considered the entire record, I conclude Alpha has failed to establish by a preponderance of the more probative evidence that Mr. Al-Soufi's designation as a Level III engineer was inappropriate.

CONCLUSION

Since Alpha Corporation has failed to meet its burden of proof, the Regional Administrator's finding that at the time of the August 1994 Labor Conditions Application, Mr. Al-Soufi performed the duties of a Level III engineer with an associated prevailing wage of \$46,904 is appropriate.

ORDER

Accordingly, Alpha Corporation's appeal of the Regional Administrator's prevailing wage determination is **DENIED**.

SO ORDERED:

Richard T. Stansell-Gamm
Administrative Law Judge

Washington D.C.

ADDITIONAL COMMENT

With the resolution of the prevailing wage issue, the parties will return to the companion case, 1999- LCA-2. In that regard, I note that between the start of Mr. Al-Soufi's employment in March 1993 and the submission of the August 1994 LCA, Alpha Corporation was not subject to the provisions of the August 1994 LCA. Although Mr. Al-Soufi may have subsequently determined he was undervalued at Alpha, he accepted and worked at Alpha's offered annual salary of \$31,000. The parties appear to be bound by the terms of that employment agreement until Alpha formally committed in the August 1994 LCA to pay Mr. Al-Soufi the higher of the actual wage or prevailing wage. Consequently, the RA's determination that Mr. Al-Soufi was a Level III engineer may only affect the appropriate salary for Mr. Al-Soufi at Alpha Corporation after August 1994.

INDEX OF TERMS AND ABBREVIATIONS

Administrator	-	Administrator, Wage and Hour Division	-4-
ALPHA	-	Alpha Corporation	-1-
ASCE	-	American Society of Civil Engineers	-10-
BLS Survey	-	Bureau of Labor Statistics Bulletin 3075-7: Occupational Compensation Survey for Washington, D.C.-Maryland-Virginia, Metropolitan Area	1-
CEO	-	Chief Executive Officer	-13-
CME	-	CME Engineering Company	-9-
DOL	-	U.S. Department of Labor	-1-
ESA	-	Employment Standards Administration	-4-
ETA	-	Employment and Training Administration	-1-
HOV	-	High occupancy vehicles	-8-
INS	-	Immigration and Naturalization Service	-3-
JSA	-	Caption of JSCS cases appealed to the OALJ	-5-
JSCS	-	Job Services Complaint System	-1-
LCA	-	Labor Condition Application	-3-
OALJ	-	Office of Administrative Law Judges	-4-
RA	-	Regional Administrator	-1-
SESA	-	State Employment Security Agency	-4-
USES	-	United State Employment Services	-4-
VDOT	-	Virginia Department of Transportation	-8-
VEC	-	Virginia Employment Commission	-5-
Virginia Board	-	Virginia Board for Architects, Professional Engineers, Land Surveyors, and Landscape Architects, Department of Professional and Occupational Regulation	-8-